DAISY'S ORIGINALS, INC. v. NLRB: NEW RESTRICTIONS ON THE USE OF BARGAINING ORDERS UNDER THE NATIONAL LABOR RELATIONS ACT

Prior to the Fifth Circuit's decision in *Daisy's Originals, Inc. v. NLRB,*[1] the National Labor Relations Board and courts consistently held that an employer whose unfair labor practices caused the defection of workers from an incumbent union had to continue to bargain with that union, even though in fact the employer's practices may have caused the union to lose the support of a majority of workers.[2] The supporting rationale was not complex. It grew partially out of a desire to prevent an employer from benefiting from misconduct and partially out of a felt need to let a victorious union enjoy the fruits of its labors.[3] Once a bargaining relationship was established—either by Board certification[4] or by voluntary recognition[5]—an irrebuttable presumption of the union's majority status was recognized for a "reasonable length of time,"[6] ordinarily one year.[7] This presumption of majority status continued after the "reasonable length of time" had elapsed, although then the presumption became rebuttable.[8] After that point, to burst the presumption and licitly refuse to bargain, an employer had to be able to assert a good faith doubt of the union's majority status, supported by such firm evidentiary foundation as a strike call by the union without the substantial support of union employees,[9] or a direct employee request to the employer or Board that the union no

[1] 468 F.2d 493 (5th Cir. 1972).

[2] Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); NLRB v. A.W. Thompson, Inc., 449 F.2d 1333 (5th Cir. 1971), *cert. denied,* 405 U.S. 1065 (1972); NLRB v. C & C Plywood Corp., 413 F.2d 112 (9th Cir. 1969); NLRB v. Movie Star, Inc., 361 F.2d 346 (5th Cir. 1966); NLRB v. Poultry Enterprises, Inc., 207 F.2d 522 (5th Cir. 1953).

[3] *See* note 12 *infra.*

[4] The Board is empowered to hold representation elections and certify the results upon a petition filed by either the employees, the employer, or the union under § 9(c) of the Labor Management Relations Act [hereinafter the Act], 29 U.S.C. §§ 141-87 (1970). *Id.* § 159(c)(1).

[5] A union need not be certified to invoke a bargaining obligation on the part of the employer under the Act. It may establish its majority through other means, usually by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 597 (1969). An employer may force an election though, if he expresses a "good faith" doubt of the union's majority. *See id.* at 594; notes 16-17 *infra* & accompanying text.

[6] Brooks v. NLRB, 348 U.S. 96, 98-99 (1954).

[7] *Id.* at 98. The reasonable period might be extended upon a showing of a lack of employer good faith during the certification year. NLRB v. Little Rock Downtowner, Inc., 414 F.2d 1084, 1091 (8th Cir. 1969).

[8] *See, e.g., id.;* NLRB v. Gulfmont Hotel Co., 362 F.2d 588 (5th Cir. 1966).

[9] *E.g.,* Celanese Corp. of America, 95 N.L.R.B. 664, 28 L.R.R.M. 1362 (1951) (good faith doubt was created by circumstances under which a majority of employees returned to work during strike which union desired to continue). *Cf.* NLRB v. Gulfmont Hotel Co., 362 F.2d 588, 589 (5th Cir. 1966) (doubt must rest on reasonable basis, not unfounded speculation or subjective state of mind).

longer represent the employees in collective bargaining.[10] While the presence of good faith doubt was to be assessed in the light of all the circumstances, good faith was emphatically not to be recognized in the context of employer antiunion activities.[11] The weakness of such unfair labor practices, or the directness with which the unfair labor practices contributed to the union's demise, were deemed irrelevant.[12]

The foregoing precedent seems a casualty of the recent decision in *Daisy's,* in which unfair labor practices occurred simultaneously with employee decertification petitions and were apparently acknowledged[13] by the Fifth Circuit as part of a calculated effort to undermine an incumbent union's bargaining status. These actions were deemed insufficient to warrant enforcement of a bargaining order.

I. The Factual Setting

For fourteen years Daisy's Originals, a Miami corporation, recognized and bargained with Local 415 of the I.L.G.W.U. Then, in January 1968, allegedly pursuant to a "sophisticated and subtle plan to undermine the union,"[14] management sent a letter to each employee pointing out that a certain sum had been placed in trust with the union for payment as fringe benefits to

[10] *E.g.,* NLRB v. H.P. Wasson & Co., 422 F.2d 558, 561 (7th Cir. 1970) (good faith doubt created by results of noncoercive employer poll of employees showing their desire to be rid of the union, large employee turnover, and decrease in union checkoff cards).

[11] *See, e.g.,* Celanese Corp. of America, 95 N.L.R.B. 664, 673, 28 L.R.R.M. 1362, 1366 (1951):

> There must, first of all, have been some reasonable grounds for believing that the union had lost its majority status . . . . And, secondly, the majority issue must *not* have been raised by the employer in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.

[12] An employer's unfair labor practices and the union's loss of majority did not have to be tightly connected. It was felt that a bargaining order might be appropriate even in the absence of proof that the unfair practices directly caused the loss of majority. *See* NLRB v. C & C Plywood Corp., 413 F.2d 112, 115 (9th Cir. 1969), in which an allegedly speculative unfair labor practice was deemed sufficient to warrant enforcement of a bargaining order. *See also* General Elec. Co., Battery Prod., Capacitor Dep't v. NLRB, 400 F.2d 713, 730 (5th Cir. 1968), *cert. denied,* 394 U.S. 904 (1969); Sakrete of N. Cal., Inc. v. NLRB, 332 F.2d 902, 909 (9th Cir. 1964), *cert. denied,* 379 U.S. 961 (1965).

It appeared reasonable to assume that, in the presence of *any* unfair labor practices, a decline in union support did not reflect the free will of employees. *See* NLRB v. A.W. Thompson, Inc., 449 F.2d 1333 (5th Cir. 1971); NLRB v. C & C Plywood Corp., 413 F.2d 112 (9th Cir. 1969). Moreover, even if a bargaining order were foreseeably to deprive some employees of their § 7 freedom of choice, *see* note 19 *infra,* it was justified on dual grounds: "the refusal to let an employer benefit by his own wrongs and . . . the insistence that a union which has won the right to bargain is allowed to enjoy that right." General Elec. Co., Battery Prod., Capacitor Dep't v. NLRB, 400 F.2d 713, 730 (5th Cir. 1968), *cert. denied,* 394 U.S. 904 (1969) (footnote omitted); *see* Franks Bros. Co. v. NLRB, 321 U.S. 702, 704-05 (1944). Finally, it was felt unreasonable to require the Board to plumb the primary motives of individuals who had recanted union membership to separate those who were exercising free will from those who were subtly coerced into recantation. *Cf.* J.P. Stevens & Co., Gulistan Div. v. NLRB, 441 F.2d 514 (5th Cir. 1971).

[13] *See* note 23 *infra.*

[14] Daisy's Originals, Inc. v. NLRB, 468 F.2d 493, 496 (5th Cir. 1972).

union and nonunion employees alike. It adverted to rumors allegedly circulating in the shop that the union would not disburse these funds to nonunion workers and concluded that such union practices were unfair and unlawful and that they ought to be reported. In fact, the rumors were not only untrue; they did not exist. But the employer's letter had the foreseeable effect of creating serious employee apprehension as to the union's integrity.[15]

Subsequently, on February 23, while antiunion disestablishment petitions were circulated by certain employees,[16] management held a meeting of all employees at which its representative distributed a booklet describing shop work regulations and pointing to special benefits available only to nonunion employees. Another meeting was held March 8, at which time a Spanish language edition of the booklet was provided to Spanish-speaking employees.[17] At this meeting the employer representative discussed rumors of union misconduct and made clear that an employee wishing to receive maximum benefits should indicate his preference for no union.[18] Within ten days, a majority of employees indicated their desire to disestablish the union; on March 18, the employer advised the union of its loss of majority status and refused to bargain further.

II. Board Reflections and Court Reactions

Scrutinizing the union complaints which quickly ensued, the Board found that the actions of Daisy's Originals had interfered with employee free choice[19] and thus violated section 8(a)(1) of the Labor Management Relations Act;[20] it held that the em-

[15] Though in fact union stewards were soon barraged with such employee questions as " 'How do we get our money?' " *id.* at 496, the letter itself was not found an unfair labor practice, *id.* at 497; and, because of a defect in the trial examiner's hearing process (Daisy's was not allowed cross-examination of a key witness), the court declined to enforce an order based in part on a finding that no rumors existed. *Id.* at 498.

[16] It was at this point that management was clearly placed on notice of the petitions. *Id.* at 497. Thus, even if the employer had no direct role in initiating the petitions, subsequent misconduct was committed with knowledge of its possible fruits.

[17] Daisy's work force was primarily Cuban and Spanish-speaking. *Id.* at 497.

[18] The trial examiner found the "iron fist in the velvet glove" manifesting itself at this meeting. *Id.* at 497-98. This refers to a form of thinly veiled threat that benefits will be less with the union and is usually, as in *Daisy's,* violative of § 8(a)(1) of the Act. *See* NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964) (footnote omitted):

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

[19] Section 7 of the Act provides the basic employee rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

29 U.S.C. § 157 (1970).

[20] Section 8(a)(1) proscribes violations of § 7 rights, making it an unfair labor

ployer interference directly and indirectly undermined the union's majority status and prevented the employer from asserting the union's loss of majority in defense of his refusal to bargain.[21] Thus, it found that Daisy's Originals had improperly refused to bargain with the legitimate representative of its employees,[22] and as a remedy for the unfair labor practices, it ordered the employer both to cease and desist from interfering with the employees' rights and to bargain with the union.

The Fifth Circuit accepted the Board's findings of section 8(a)(1) violations[23] and enforced the cease-and-desist order, but denied the Board's petition for enforcement of its bargaining order,[24] basing its decision on a novel application of established

practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . ." *Id.* § 158(a)(1) (1970).

See note 18 *supra.*

[21] Daisy's Originals, Inc., 187 N.L.R.B. 251, 75 L.R.R.M. 1561 (1970).

[22] Section 8(a)(5) stipulates that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (1970).

[23] Although the court's holding in *Daisy's Originals* seems clear, future lawyers and courts may succeed in avoiding the results in the case by exploiting an ambiguity in the court's opinion with regard to essential facts. At the outset, the court seems to accept the Board's finding that the employer's unfair labor practices were directed at the subtle instigation of a repudiation of the union. 468 F.2d at 497-98. Later in the opinion, however, the court suggests that the unfair labor practices occurred after the union's demise and did not hasten the union downfall. *Id.* at 502. This latter language could provide support for an argument that the *Daisy's* employer actually had an evidentiary good faith doubt of the union majority, untainted by unfair labor practices. Thus, the decision would merely apply *Gissel* standards in a case in which the employer commits unfair practices after a licit refusal to bargain. *This* application of *Gissel* standards has been previously approved; *see* Ingress-Plastene, Inc. v. NLRB, 430 F.2d 542, 546 (7th Cir. 1970); Fremont Newspapers, Inc. v. NLRB, 436 F.2d 665 (8th Cir. 1970). This interpretation, however, conflicts sharply with most other language in the opinion, indicating that at least some unfair labor practices preceded the union's loss of majority. *See* note 16 *supra;* 468 F.2d at 497-98.

For an excellent example of an attempt by the Board to narrowly limit *Daisy's Originals,* see Brief for Petitioner at 14, NLRB v. Medical Manors, Inc., No. 17-1763 (9th Cir. Apr. 27, 1973). In Medical Manors, Inc., 201 N.L.R.B. No. 27, 82 L.R.R.M. 1222 (Jan. 10, 1973), an employer implemented a change in his employees' health insurance coverage unilaterally and without notice to an incumbent union. This action was found by the Board to have directly caused the circulation of decertification petitions and an eventual loss of union majority. In seeking enforcement of a bargaining order, the Board called attention to statutory policies ignored by *Daisy's Originals,* but emphasized that the Fifth Circuit's "actual holding" had only been that "in an incumbent union situation an employer should not lose his defense of a good faith doubt where the unfair labor practices 'do not tend to dissipate the union's majority' . . . ." Brief for Petitioner at 14, No. 17-1763.

[24] The Board has the power to petition the courts of appeals of the United States for the enforcement of its orders and for injunctive relief. 29 U.S.C. § 160(e) (1970).

Under § 10(c), the Board has been granted power to fashion remedies designed to effectuate the policies of the Act. 29 U.S.C. § 160(c) (1970). The choice of remedy in unfair labor practice proceedings has repeatedly been held to be "peculiarly a matter for administrative competence," Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); *see* International Ass'n of Machinists v. NLRB, 311 U.S. 72, 82 (1940). Thus the Board's choice of a specific remedy has been sustained unless in excess of the Board's statutory authority. *E.g.,* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

In fact, the Board has been criticized at times for its failure to use this creative power to its fullest extent. *See* Note, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act,* 112 U. PA. L. REV. 69 (1963).

The remedy routinely chosen by the Board and accepted by the courts when an employer's unfair labor practices have dissipated the union's majority and he has then tried to use that dissipation as the basis of a good faith doubt of the union's majority

doctrine. The court chose to disregard past practice[25] and applied instead a set of criteria previously developed by the Supreme Court in *NLRB v. Gissel Packing Co.*[26] In each of three cases[27] reviewed together in *Gissel,* a union attempted to organize the employees of previously nonunion employers, obtained authorization cards from an employee majority, and was then met by employer denials of the cards' validity and with employer unfair labor practices that tended to undermine the union's majority status and caused an election to be set aside, or prevented the holding of fair elections.[28] The Board's response in each case was to issue a bargaining order, even though no election had been held in two of the cases and the employer had won an election in the third.

In weighing the propriety of the Board's chosen remedy, the *Gissel* court[29] held that a bargaining order was appropriate depending upon the circumstances and the severity of the unfair labor practices, and divided the continuum of future possibilities into three categories. First, where "outrageous" and "pervasive" practices occurred, it held a bargaining order appropriate without need of inquiry into the majority status of the union. Second, it held that less pervasive, less extraordinary employer misconduct which destroyed a previous union majority sufficed to accord the Board discretion to issue a bargaining order. Third, it held that minor, less extensive unfair labor practices with a minimal impact on election machinery did not warrant bargaining orders.[30]

Daisy's saw an incumbent union's majority status dissipated; *Gissel* involved only the dissipation of a new, unrecognized union's majority. The Fifth Circuit recognized the factual differences between the two cases but concluded that the policy considerations in both cases were sufficiently similar that the *Gissel* guidelines should control in each.[31] The court reasoned that an employer is under no less compelling a duty to bargain with a fledgling union profferring a card majority than with an incumbent union of long standing presenting a bargaining demand. In each case, the court noted, the employer is faced with an unfair labor practice charge should he refuse to bargain; in

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status in violation of § 8(a)(5), *see* note 22 *supra,* is the issuance of a bargaining order, *see* notes 2, 12 *supra.*

[25] *See* notes 2, 9-12 *supra.*

[26] 395 U.S. 575 (1969). *See generally* Note, NLRB v. Gissel Packing Co.: *Bargaining Orders and Employee Free Choice,* 45 N.Y.U.L. REV. 318 (1970).

[27] A fourth case reviewed in *Gissel, Sinclair Company,* was factually similar but centered on the issue of employer free speech. NLRB v. Gissel Packing Co., 395 U.S. 575, 587-90, 616-20 (1969).

[28] *Id.* at 610.

[29] *See* note 26 *supra.*

[30] 395 U.S. at 613-15.

[31] *See* note 47 *infra.*

each case, a "substantial good faith doubt of the union's majority"[32] is a defense to the charge. Thus, the court concluded, an employer should not lose his good faith doubt defense in either case when his unfair labor practices do not prevent the holding of a representation election.

Examining the unfair labor practices committed by Daisy's Originals, the Fifth Circuit found that they fell within the third *Gissel* category,[33] and it therefore refused to enforce the Board's bargaining order. It indicated that the unfair labor practices had not so impaired employee free choice that an election could not be conducted, and held that the employee choice implicit in the decertification petition should stand. Thus, the employer was freed from his bargaining obligation.[34]

III. The Aftermath

Before *Daisy's,* an employer could avoid bargaining with an incumbent union after the initial period of presumed majority status only by expressing a good faith doubt[35] or by winning a decertification election.[36] *Daisy's* quietly but significantly encourages use of the former method and adds enormously to the practical ability of the employer to unseat incumbent unions. It allows an employer to commit minor unfair labor practices which unsettle employees, undermine the union's majority, and then enable the employer to piously express good faith doubt of the union's majority. Once the employer has created a rational basis for refusal to bargain, the union will be forced into a position of inferiority and required to take new initiatives to prove anew its majority status. The only chastisement that the employer must suffer for this choice opportunity to oust a troublesome union is a slap on the wrist, in the form of an order to cease and desist from his unfair labor practices.

An employer who wishes to take advantage of this decision must, of course, be careful not to commit violations within the first or second *Gissel* categories,[37] for in either case a bargaining

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[32] 468 F.2d 493, 501 (citations omitted).

[33] *See* text accompanying note 30 *supra.*

[34] As the last contract ended May 31, 1968, Daisy's Originals, Inc., 187 N.L.R.B. 251, 75 L.R.R.M. 1561, 1562 (1970), the union had no further control over the employer or employees; although after the decision the employees or union could, of course, petition the Board for a certification election after a year had elapsed. *See* note 4 *supra*; note 51 *infra.*

[35] *See* notes 9-12 *supra* & accompanying text.

[36] A decertification election may be obtained by filing with the Board a petition signed by 30% or more of the employees expressing their desire to no longer be represented by the union. *See* 29 U.S.C. § 159(e) (1970).

The availability of such an election is qualified by several Board rules not relevant here. For example, § 9(c)(3) of the Act bars another election for 12 months after the holding of a valid election. *Id.* § 159(c)(3). Also, in certain circumstances a collective bargaining contract will bar the holding of an election. *See generally* Freidin, *The Board, the "Ban" and the Bargain,* 59 Colum. L. Rev. 61 (1959); *cf.* note 4 *supra*; note 51 *infra.*

[37] *See* text accompanying notes 29-30 *supra.*

order could issue at the Board's discretion.[38] The decision to deny a bargaining order in *Daisy's* was predicated on the assumption that employee free choice was still possible in that factual setting; this would not have been the case in the presence of more coercive unfair labor practices, the factor which led the *Gissel* court to hold bargaining orders appropriate in some situations.[39]

Past cases applying the *Gissel* criteria to demands for recognition by new unions provide the best guide to how far an employer can go in committing unfair labor practices to undermine a union's majority status and then successfully refuse to bargain on the basis of a "good faith doubt." Although *Gissel* is itself a fairly recent decision, some general trends in its application have already emerged. The most extreme case, one which will always be subject to a bargaining order, is one in which the employer discharges all employees when presented with a bargaining demand by the union.[40] Short of this vindictive behavior, the discharge of employees to discourage union adherents,[41] or the grant of wage increases to influence an election's outcome,[42] will generally result in the issuance of a bargaining order when the union initially had a card majority. Also, when an employer combines illicit employee interrogation with threats to close the plant, discharge union sympathizers or eliminate existing fringe benefits, a fair election will generally be considered impossible and a bargaining order will issue if the union initially had a card majority.[43] On the other hand, illicit interrogation by itself[44] or illicit interrogation combined with minor threats of reprisal[45] or suggestion of greater benefits without the union[46] will generally not trigger a bargaining order.

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[38] A bargaining order may issue at the Board's discretion in the second *Gissel* category. In the first *Gissel* category, it appears that there is little or no discretion. 395 U.S. at 613-15. However, the latter situation is very rare and as a general rule the issuance of a bargaining order will be at the Board's discretion.

[39] 395 U.S. 575, at 613-15.

[40] Beach Mfg. Co., 192 N.L.R.B. No. 47, 77 L.R.R.M. 1716 (1971).

[41] *See* NLRB v. Tri-State Stores, Inc., 477 F.2d 204 (9th Cir. 1972), *cert. denied*, 42 U.S.L.W. 3386 (U.S. Jan. 7, 1974); NLRB v. Sitton Tank Co., 467 F.2d 1371 (8th Cir. 1972); NLRB v. Medley Distilling Co., 453 F.2d 374 (6th Cir. 1971); Quaker Bakery Mach. Co., 198 N.L.R.B. No. 141, 81 L.R.R.M. 1003 (Aug. 21, 1972); W.T. Grant Co., 195 N.L.R.B. No. 183, 79 L.R.R.M. 1670 (Mar. 22, 1972); United Elec. Co., 194 N.L.R.B. 665, 79 L.R.R.M. 1051 (1971).

[42] *See* NLRB v. Colonial Knitting Corp., 464 F.2d 949 (3d Cir. 1972); NLRB v. Tower Records, 79 L.R.R.M. 2736 (9th Cir., Jan. 21, 1972); Unarco Indus., 197 N.L.R.B. No. 76, 80 L.R.R.M. 1621 (June 14, 1972); WKRG-TV, Inc., 190 N.L.R.B. No. 34, 77 L.R.R.M. 1078 (Apr. 29, 1971).

[43] *See* NLRB v. Juniata Packing Co., 464 F.2d 153 (3d Cir. 1972); Donahue Beverages, Inc., 199 N.L.R.B. No. 84, 81 L.R.R.M. 1580 (Oct. 10, 1972). *But see* Dent Poultry Co., 188 N.L.R.B. 426, 76 L.R.R.M. 1557 (1971).

[44] *See* Action Advertising Co., 195 N.L.R.B. No. 122, 79 L.R.R.M. 1455 (Feb. 28, 1972); Thomas Markets, 191 N.L.R.B. No. 75, 77 L.R.R.M. 1451 (June 21, 1971).

[45] *See* Servico Protective Covers, Inc., 199 N.L.R.B. No. 160, 81 L.R.R.M. 1370 (Oct. 24, 1972).

[46] *See* Dent Poultry Co., 188 N.L.R.B. 426, 76 L.R.R.M. 1557 (1971).

IV. ASSESSMENTS

The heart of the Fifth Ciruit's decision in *Daisy's* was an assumption that an employer is under an equally compelling duty to bargain with a fledgling and an incumbent union.[47] This much seems indisputably correct. But the court apparently found identical requirements for good faith doubt sufficient to support a refusal to bargain in either case, and ignored the recognition by past courts of two separate good faith standards. To refuse to bargain with a new union, an employer has not in the past been required to have any basis for his doubt;[48] to refuse to bargain with an incumbent union, however, courts have required that an employer have evidentiary basis for his doubt, a basis untainted by his own unfair labor practices.[49] This key distinction has been recognized because the employer with an incumbent union has either had or has voluntarily foregone a fair election. While the presumption of union majority status may no longer reflect the reality of employee desires, it has been felt foolishly dangerous to allow that presumption to be washed away in this setting, as there is considerable realistic danger that it is the employer's unfair practices, and not employee desires, which have precipitated the loss of majority. And there is equal danger that allowing the presumption to be burst in the presence of employer misconduct will encourage new brinksmanship in subtle employer propagandization and coercion.

The *Daisy's* result represents a theoretic victory for employee free choice; it hypothetically enables workers to exercise their industrial franchise and cast off the yoke of a union grown unresponsive or irresponsible. Yet, although *Gissel* found that sufficiently tepid unfair labor practices do not destroy employee free choice where an initial decision on unionism is at stake, an incumbent union majority pragmatically justifies more scrupulous protection of that industrial franchise. The fortuitous coincidence of employee desires for disestablishment with employer unfair labor practices directed against the incumbent union suggest that the victory of employee free will may be illusory in such a setting. Thus, even if one's primary concern is employee self-determination, the long-recognized necessity for special "laboratory conditions"[50] in the peculiar setting of an industrial

[47] 468 F.2d 493, at 501: "The facts of *Gissel* are certainly dissimilar, but the policy considerations are not. A fledgling union's right to bargain in good faith is as strong as the incumbent's of fourteen years." *See* notes 28-30 *supra* & accompanying text.

[48] *E.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1968):

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant . . . . Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union.

[49] *See* notes 11-12 *supra* & accompanying text.

[50] *See* General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948):

election, where subtle irrational forces and erroneous information frequently weigh overheavily, supports the prophylactic protection accorded existing union majorities in the past.[51]

Moreover, the *Daisy's* situation involves considerations other than and in competition with employee free choice. In a *Gissel* setting the sole aim is to assure the employees' free choice of a collective bargaining representative by the most reliable available method.[52] The most generally reliable barometer of employee will is a representation election, and absent substantial unfair labor practices, such an election should be held if any party so desires. Where an incumbent union is concerned, the aim of assuring employee free choice remains, but has already been followed in the union's original recognition, any may again be followed in the future upon the showing of employee desire for decertification unattended by employer unfair labor practices.[53] Another strong competing policy which comes into play, the promotion of industrial peace and stability,[54] requires assurance of stability in existing collective bargaining relationships.[55] This policy is endangered by the holding of

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"In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *Cf.* Dal-Tex Optical Co., Inc., 137 N.L.R.B. 1782, 50 L.R.R.M. 1489 (1962).

[51] Of course, the situation may be imagined in which there is a coincidence between employee desires for disestablishment, uninfluenced by employer conduct, and employer unfair labor practices. If this were the situation in *Daisy's*, it is clear that a bargaining order would impinge upon employee free will. Apparently, issuance of the bargaining order will prevent the holding of a decertification election for a full year. *See* Mar-Jac Poultry, 136 N.L.R.B. 785, 49 L.R.R.M. 1854 (1962); NLRB FIELD MANUAL ¶ 11730 (rev. ed. 1971). However, it seems clear under past practice, *see* notes 9-12 *supra*, that if past unfair labor practices by Daisy's could be deemed purged by issuance of the bargaining order sought, nothing would preclude the employer from raising a subsequent good faith doubt of the union's majority—supported by evidence of employee desire for disestablishment and unattended by new invidious practices—as a defense to a subsequent refusal to bargain.

[52] *See* NLRB v. Frick Co., 423 F.2d 1327, 1330-31 n.6 (3d Cir. 1970); Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950). This policy is openly declared in § 1 of the Act:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1970).

[53] *See* note 51 *supra*.

[54] Experience has . . . demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in . . . commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

29 U.S.C. § 151 (1970).

[55] *See id.*; NLRB v. Frick Co., 423 F.2d 1327, 1330-31 n.6 (3d Cir. 1970). *See generally* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 2-4 (1947).

frequent, disruptive representation elections, and necessitates that existing relationships be accorded a presumption of validity to be dispelled only by good faith doubt supported by evidence free of employer taint.[56]

The decision in *Daisy's*, unfortunately, gives the employer an opportunity, through the commission of insidious minor unfair labor practices, to place incumbent unions on the defensive, and possibly oust unions of marginal support. This opportunity will almost assuredly be taken by some employers, with resulting union work stoppages and strikes in retaliation. An employer who knows that he may be able to oust the union by his own conduct after the initial period of presumed majority status will be less willing than ever to bargain to reach an agreement, and may decide to wait and take a chance on ousting the union altogether.

V. Conclusion

Disregard in *Daisy's* of a time-honored distinction between two good faith standards may do violence to the promotion of industrial peace. The decision creates new hope for employers who refuse to accept the advent of unionism and does little to promote the right of free choice of employees which was adequately protected before the decision.[57] A less destructive approach to the protection of employee free choice would seem to lie in further control of union and employer electioneering in the organizational stage of union representation to assure an intelligent, initial employee decision on the merits of unionism. Beyond the organizational stage, the employee right of free choice must not only be scrupulously protected from subtle employer propagandization, but must as well be balanced against a compelling goal of industrial harmony. *Daisy's Originals*, unfortunately, seems to have struck an incorrect balance.

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[56] Another circuit court came to this conclusion before the *Daisy's Originals* decision. *See* NLRB v. Frick Co., 423 F.2d 1327, 1330-31 n.6 (1970).

[57] *See* notes 12, 35-36 *supra* & accompanying text.